92-109

NO. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, TERM, 1991

LOGAN P. HUNTRESS,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the substitution of a regular juror with an alternate juror, when the Court ex parte discharged a regular juror without an evidentiary hearing, and after jury delibertions began, violate Mr. Huntress' constitutional and procedural rights?

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The Petitioner, LOGAN P. HUNTRESS, respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit rendered on March 18, 1992. The Petition for Rehearing was timely filed and denied on April 23, 1992. A Motion or Stay of Mandate Pending

Petition for Writ of Certiorari was filed with the Fifth Circuit Court Clerk requesting a stay until May 28, 1992, and is still pending.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is not reported and the opinion is in the Appendix at page A-1.

The Order of the Fifth Circuit Court of Appeals denying the Petition for Rehearing is not reported and is in the Appendix at Page A-14.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1).

The District Court had jurisdiction under 18 U.S.C.A. §3231.

The Court of Appeals had jurisdiction of the Appeal from the District Court under 28 U.S.C.A. §1291.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment to the United States Constitution provides, in pertinent part, as follows:

> No person shall... be deprived of life, liberty, or property, without due process of law...

2. The Sixth Amendment to the United States Constitution provides, in pertinent part, as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...

3. Mr. Huntress bases his appeal on Federal Rules of Criminal Procedure, Rule 23, 18 U.S.C.A. which provides, in pertinent part, as follows:

> ... Juries shall be of 12 but at any time before verdict the parties may stipulate in writing

> with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences. Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the Court a valid verdict may be returned by the remaining 11 jurors...

5. Mr. Huntress also bases his appeal on Federal Rules of Criminal Procedure, Rule 24, 18 U.S.C.A., which provides, in pertinent part, as follows:

> ...Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties...

STATEMENT OF THE CASE

Following an indictment, a five day trial, and the judge's instructions on the

merits, the alternate juror was dismissed, and the jury began its deliberations. The deliberations lasted the remainder of the first day. On the start of the second day, the foreman sent the judge a note stating a juror was having a problem. The foreman then informed the court the problem was with the facts or the law in the case and that a juror did not want to take part in arriving at a verdict. The judge responded with a note instructing all jurors to continue deliberating until a verdict was reached. The jury deliberated the rest of the second day. At the beginning of the third day of deliberations, a person telephoned the district judge ex parte and indicated that he was a doctor of the juror, and the juror was suffering from stress from the jury service and paranoia related to a history of drug abuse, and was unable to continue in the deliberations or reach a verdict. Following discussions with the attorneys outside the presence of Mr. Huntress, the judge found "good cause" and excused the

juror without holding an evidentiary hearing and without verification of the ex parte statements.

The judge offered three alternatives: (1) declare a mistrial; (2) let the 11 jurors continue to deliberate; or (3) recall the alternate juror. Mr. Huntress would not agree to a verdict from the 11 jurors and requested the 12th juror's continued service in the deliberations. Mr. Huntress objected to the regular juror's release without an evidentiary hearing for a "good cause" finding, and Mr. Huntress objected to the alternate juror being recalled to deliberate with the 11 original jurors since the alternate juror had been excused and did not have the benefit of hearing the initial ideas and discussions over the last two days of deliberations and was now a newcomer to the deliberations. The Government requested an 11-juror verdict and informed the court that an 11-juror verdict was valid under the Federal Rules of Criminal Procedure. Mr. Huntress then

moved for a mistrial. The judge denied the mistrial motion of Mr. Huntress. With no other choice, Mr. Huntress then asked that the alternate juror be questioned concerning whether she could be properly impaneled.

The judge recalled the alternate juror, and the alternate juror said she had, in general terms, discussed the case with her employer, but this would not affect her decision in the case. The 11 other jurors told the judge they could set aside the prior two days of deliberations with the excused juror and restart the deliberations with the alternate juror. The judge then decided to substitute the alternate juror for the regular juror, and the reconstituted jury elected the same foreman and resumed deliberations. After only three hours of deliberations, this jury found Mr. Huntress guilty on all five counts. (One Count was dismissed by the court prior to submission.)

Mr. Huntress was sentenced on April 25,

1991, and committed to the custody of the Attorney General for a term of imprisonment for two years on each of the five counts. The sentences on Counts One and Two are to run consecutively and Counts Three through Five were suspended. Mr. Huntress was placed on five years probation with supervision upon the completion of the sentences on Counts One and Two. Mr. Huntress was further ordered to make restitution in the amount of $730,000.00 through the United States Department of Justice to the various banking entities named in the indictment. He is currently on a $50,000.00 unsupervised, personal recognizance bond.

Mr. Huntress perfected his appeal to the United States Court of Appeals for the Fifth Circuit, and oral argument was heard on February 5, 1992. On March 18, 1992, the Fifth Circuit rendered a decision affirming Mr. Huntress' conviction, but accepting his argument that Federal Rule of Criminal Procedure 23(b) was

violated by the trial Court and ordering the district courts, from this point forward, to follow the decision. The Fifth Circuit concluded that a violation of Rule 23(b) and 24(c) does violate the rights of the defendant and required a district judge in the future to follow the literal terms of these Rules. After holding the "safeguards" used by the Judge as inadequate and ordering the Rules should be followed in the future, the Fifth Circuit concluded that Mr. Huntress was not prejudiced because of the "safeguards". The Fifth Circuit further held the ex parte communication between the Judge and a third party was sufficient to remove the necessity of an evidentiary hearing in which both parties could explore existence of just cause for dismissal.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to review the judgment of the Court of Appeals

because: (1) the Court of Appeals has rendered a decision in conflict with the decisions of the United States Courts of Appeals for the Third and Ninth Circuits on the same matter; (2) the Court of Appeals has sanctioned a departure, by the trial court, from the accepted and usual course of judicial proceedings, of excusing regular jurors from further deliberations without an evidentiary hearing, as to call for this court to exercise its powers of supervision under Supreme Court Rule 10.1(a); and (3) Mr. Huntress' rights under the Fifth and Sixth Amendments have been violated.

I.

The Court of Appeals Decision Conflicts with a Decision of the Third Circuit Court of Appeals.

In United States v. Gambino, 788 F.2d 938 (3rd Cir. 1986), the trial judge excused a juror after deliberations had begun and relied upon

Fed. Rule Crim Proc. Rule 23(b), 18 U.S.C.A. to arrive at an eleven juror verdict. Gambino at 947. The defense argued that the judge misinterpreted Rule 23(b) as prohibiting an alternate juror to be substituted for a regular juror after deliberations had begun. Gambino at 947. The court cited United States v. Kopituk, 690 F.2d 1289 (11th Cir. 1982), cert. denied sub. nom., Turner v. United States, 461 U.S. 928, 103 S.Ct. 2089, 77 L.Ed. 2d 300 (1983) which stated the alternate juror substitution is "applicable only in extraordinary situations and, even then, only when extraordinary precautions are taken... to insure that the defendants are not prejudiced." Gambino at 948. The court said that it is absurd for someone to argue that a trial judge should have substituted an alternate juror for a regular juror after deliberations had begun especially since this scenario was explicitly rejected by the 1983 Rules Committee that revised Rule 23(b). Gambino at 948-949.

II.

The Court of Appeals Decision Conflicts with a Decision of the Ninth Circuit Court of Appeals.

In United States v. Lamb, 529 F.2d 1153 (9th Cir. 1975), after two days deliberations, the trial judge substituted an alternate juror for a regular juror, and told the jury to begin their deliberations over as if they had never deliberated before in the case. Id. at 1155. Twenty-nine minutes later, the jury returned a guilty verdict. Id. at 1155.

The court cited Fed. Rule Crim. Proc. Rule 24(c), 18 U.S.C.A. whose mandatory language prohibits an alternate juror from being substituted for a regular juror after deliberations have begun. Id. at 1155. The court said when an alternate juror is allowed to join the deliberations after the original jury has begun its deliberations, "the violation of the plain prohibition of the Rule is so patently

impermissible that the 'possibility of prejudice,'... is manifest." Lamb at 1156, n.3. The court quoted C. Wright, Federal Practice and Procedure §388, Vol. 2 at p. 52 (1969) which states, "it is reversible error, even though defendant may have consented, ...to substitute an alternate after deliberations have begun." Lamb at 1156. It was noted that a proposed rule allowing substitution of an alternate after deliberations had begun was rejected by the 1941 Advisory Committee on Criminal Rules after the Supreme Court of the United States asked if the Committee was satisfied this was desirable or constitutional, and post dismissal use of the alternate was rejected by the American Bar Association Project on Minimum Standards for Criminal Justice in 1974 and by the Jury Committee of the Judicial Conference of the United States in 1973. Lamb at 1156, n.4 and 5.

The court in Lamb was convinced of a manifestly inherent, impermissible coercion on the alternate juror substituted for the regular

juror after deliberations had begun, and of a lack of "conscientious, careful reconsideration by the twelve of the newly constituted jury." Id. at 1156. The court was convinced this coercion resulted from the fact that the judge told the jury to start deliberations at the beginning, but the jury, which earlier had not reached a verdict in two days, reached a second verdict in only twenty-nine minutes. Id. at 1156. The court then reversed and remanded the case for the Rule 24(c) violation by the trial judge.

III.

Evidentiary Hearing Required for Due Process in Determining Just Cause.

The Court of Appeals overlooked the fact that no effort was made by the trial judge to verify the existence and credentials of the person who spoke to the judge on the phone

before he excused the juror. The Judge's decision to excuse the juror was based solely on his ex parte phone conversation with a man who stated he was a psychiatrist. There is no credible evidence of any verification by the trial court that the person the judge spoke with was in fact a psychiatrist qualified to make a medical diagnosis of the juror. The phone conversation occurred ex parte, outside the presence of Mr. Huntress and his attorney. Mr. Huntress and his counsel had no opportunity to participate in or even observe this ex parte inquiry. Furthermore, the "doctor" was not under oath during the phone conversation, and he was not called as a witness. The Court had ample time to conduct a hearing and bring the "doctor" to the courtroom. Therefore, any presumption in favor of his credibility and qualifications by the Court of Appeals based on the appellate standard of review in criminal cases is judicially improper.

The record does not show any of the following:

1. The Judge actually spoke with a "doctor".

2. The "doctor" was a qualified psychiatrist.

3. The "doctor" treated the juror.

4. The "doctor" spent more than a "few" minutes with the juror.

5. The "doctor" could not come to court.

6. Any verification by the judge that the person on the phone was a "doctor".

7. Any evidence of illness exhibited by the juror prior to the phone call.

8. Multiple witness observance of the juror's illness.

The Court of Appeals continued to refer throughout its opinion to the "evidence" of the juror's illness. Surely this Court has no desire to elevate an ex parte judicial phone call to the status of credible evidence. The

real issue is whether we give meaning to the term "just cause". Can a juror simply call the trial court in fear of his physical or mental health and remove himself or herself? Better yet, can a juror call a friend who is a doctor, and have the doctor call on their behalf? The Court of Appeals' opinion elevates the status of non-credible witnesses in the criminal justice system by removing the orderly rule of law and returning the court to the arbitrary rule of man. The "doctor" was purportedly available, and the juror was available for questioning that same day. The hearing would have delayed the jury deliberations for less than a day. The Court should not elevate ex parte judicial inquiry to the level of sworn testimony or evidence received in the courtroom before the judge, lawyers and defendants in a criminal judicial setting. This Court should set standards for "just cause" which include an evidentiary hearing, if possible, so that no one may ever

tamper with a juror or the jury system, be it defendant, juror, judge, or attorney.

The Court of Appeals dismissed Mr. Huntress' contention that the regular juror was a holdout because of his "mental illness". Obviously, he held out for a day and one-half. Is that any less credible than an unverified person's opinion that could have spent no more than a few hours with the "ill" juror prior to offering his diagnosis over the phone? The Court of Appeals asserted that Mr. Huntress used pure speculation with no support that the juror was a holdout. The secret nature of jury deliberations will always protect the jurors and cause speculation. However, in this case the foreman told the trial judge that a juror could not make a decision based upon the facts or law.

Showing prejudice in the jury process necessitates speculation because of the jury's secret deliberations. Because the evidence is so overwhelming when you believe the government

witness, as in a "no evidence" case, prejudice will never raise its head. Again, you can remove the rule of law and proper order in court proceedings by saying the end justifies the means. Mr. Huntress is entitled to a jury that deliberates within the federal rules. He did not get that minimal due process and its absence will taint his verdict forever.

The sole factual support for the discharge of the juror was the "doctor's" opinion, which was not subjected to any standard of credibility, but was simply accepted at face value by the trial court. The Court of Appeals made the same leap of faith when it did not question the trial judge's blind assumption that the "doctor" existed and was qualified to opine on the juror's mental condition. In fact, the Court of Appeals used the "doctor's" conclusion that the juror was too mentally impaired to be a juror and in turn dismissed Mr. Huntress' arguments that the juror lied on voir dire and

may have been holding out when he was dismissed. The "doctor's" opinion also formed the basis of the trial judge's decision to deny Mr. Huntress' motion for mistrial.

Overlooking the absence of any independent verification of the "doctor's" qualifications to diagnose the jurors mental condition undermines the sole factual support for the finding of "just cause" to discharge the juror. Under United States V. Rodriguez, 573 F.2d 330, 332 (5th Cir. 1978), prejudice occurs when a juror is discharged without factual support. The existence of and credibility of the "doctor" was not determined, but merely assumed, by the trial judge and the Court of Appeals and, therefore, his opinion do not constitute facts capable of supporting the trial judge's decisions to discharge the juror.

Allowing such juror substitutions without an evidentiary hearing repulsed the Ninth Circuit Court in Lamb since a lone juror,

holding out for a defendant because the juror could not vote "guilty" like the other 11 jurors, could yield to this pressure and fake an illness so an alternate juror would then have the burden of making the decision. Lamb at 1156. Evidentiary hearings must be required before a regular juror is excused to prevent a juror from giving in to such pressures by trying to fake an illness.

The Advisory Committee Notes to the 1983 Amendment of Rule 23(b), discusses a proposal to allow an alternate juror to be substituted for a regular juror if the regular juror becomes unable to proceed after jury deliberations have begun. The Supreme Court's doubts as to the desirability and constitutionality of such a substitution "are as forceful now as they were a quarter century ago." The Committee cited Moore, Federal Practice, par. 24.05 (2d ed. Cipes 1980) which states that the alternate juror, who joins a jury leaning heavily toward a

guilty verdict, is exposed to an inherent coercive atmosphere which can result in the alternate juror reaching a premature verdict.

The Committee stated that such substitutions affect the constitutional right to procedural due process under the Fifth Amendment and right to a jury trial under the Sixth Amendment since there is no method of erasing the impact from the earlier deliberations from which the alternate juror was absent. When the judge instructs the jurors to restart the deliberations with the new juror, the original jurors will still be influenced by the earlier deliberations leaving the newly substituted juror intimidated by the original jurors because of the new juror's lack of knowledge and exposure to the earlier deliberations.

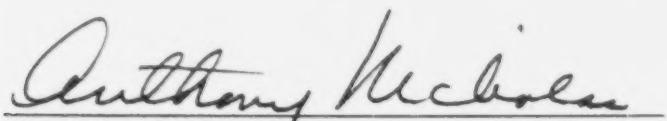
Allowing the alternate juror to be substituted, without an evidentiary hearing, for the regular juror after two days of deliberations violated Mr. Huntress' Fifth

Amendment right to due process of law and Sixth Amendment right to trial by an impartial jury. When the regular juror, who was unable to decide on a verdict, was replaced by an alternate juror in violation of Fed. Rules Crim. Proc. Rules 23(b) and 24(c), 18 U.S.C.A., resulting in a guilty verdict by the jury with the same foreman merely three hours later, Mr. Huntress was clearly prejudiced. Such a substitution, upheld by the Fifth Circuit, is in conflict with the decisions of the Third and Ninth Circuits, is in conflict with the accepted and normal course of judicial proceedings of holding evidentiary hearings before discharging a juror, and is in conflict with the 1983 Advisory Committee on Criminal Rules.

CONCLUSION

For the above and foregoing reasons, a writ of certiorari should issue to review the decision of the United States of Court of Appeals for the Fifth Circuit.

Respectfully submitted,



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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-5626

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LOGAN P. HUNTRESS,
Defendant-Appellant

Appeal from the United States of District Court for the Western District of Texas

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Before THORNBERRY, KING and DeMoss, Circuit Judges. King, Circuit Judge:

This case principally requires us to clarify the procedures a district judge must follow when a juror is dismissed during deliberations. We also review several other alleged errors that took place at trial. We will affirm the appellant's conviction.

I. BACKGROUND

Logan P. Huntress was tried by a jury on five counts of knowingly making false statements to federally insured banking institutions for the purpose of influencing them to extend credit to him, in violation of 18 U.S.C. § 1014. He was convicted and sentenced to two consecutive two-year sentences, five years of probation, restitution of $730,000, and a $50 special assessment on each count. The evidence at trial showed that Huntress submitted false financial statements when he applied for loans from several San Antonio banks. Huntress stated in the financial statements and in discussions with bank officers that he owned a substantial unencumbered stock portfolio, although he did not own the stocks listed on the financial statements. Officers from the various banks involved testified

that they relied upon Huntress's false written and oral statements regarding his financial position in deciding to extend credit.

As the primary contentions on appeal concern events that occurred after the trial, we relate those events here in some detail. We will discuss the facts bearing upon Huntress's other arguments in the course of our legal analysis of those arguments.

After the close of the evidence, the jury retired to deliberate and the judge dismissed the alternate juror. The jury deliberated for the rest of that day. On the morning of the next day, the court received a note from the jury foreman stating that one of the jurors wanted a conference with the judge. In response to questioning, the foreman told the judge that the juror had a problem with the

facts or the law of the case. The judge told the jury foreman to submit the juror's question in writing. An hour later, the jury sent a note that said, "A juror doesn't want to participate in arriving in a verdict. What do we do?" The judge sent a note back stating, "All jurors will continue to deliberate until you have reached a verdict." The jury did not reach a verdict that day, and, because they were not sequestered, they went home.

The next morning, Dr. Nau, a doctor who was treating juror Homoki, contacted the court. Mr. Homoki had checked himself into a hospital the previous night, threatening to inquest fire ant killer if the hospital refused to admit him. After some discussion with the parties, the judge called Dr. Nau to find out the details surrounding the juror's condition. Dr. Nau told the judge over the telephone

that the juror was distraught and suicidal, and that he was suffering from paranoia stemming from a history of drug abuse. Dr. Nau opined that Mr. Homoki's condition was brought on by the stress related to his jury service, and that Mr. Homoki could not make a decision in the case in his present condition. He recommended that Mr. Homoki not be required to return to jury duty upon his imminently scheduled release from the hospital. Defense counsel requested an evidentiary hearing to examine Mr. Homoki as well as the doctor, but the judge determined that his conversation provided a sufficient basis for excusing Mr. Homoki from jury service. No evidentiary hearing was held.

The district judge presented the parties with three options: allow the remaining 11 juror to proceed to a

verdict; recall the alternate juror, Ms. Lizana; or declare a mistrial. Huntress objected to the release of Mr. Homoki, refused to stipulate to an 11-juror verdict, and objected to recall of the alternate juror. The government expressed a preference for an 11-juror verdict, and pointed out that, under Fed. R. Crim. P. 23(b), the court could permit the 11-member jury to proceed to verdict without obtaining the defendant's consent. Huntress then moved for a mistrial based on Mr. Homoki's failure trustfully to answer voir dire questions concerning his ability to serve on the jury. The judge had asked during voir dire, "Is there anyone on the jury panel that has any serious personal situation or medical or physical problem which would make it difficult or impossible for you to sit as a juror in this case?" Mr. Homoki had not

responded to this question. The judge, citing Dr. Nau's statement that Mr. Homoki would have been unable to recognize and disclose his psychological condition during voir dire, decided that Mr. Homoki did not deliberately lie, and denied Huntress's motion for a mistrial.

Huntress then requested that Ms. Lizana, the alternate juror, be recalled and examined to determine whether she could properly be reimpaneled. The judge recalled Ms. Lizana and questioned her. Ms. Lizana stated that she had discussed the case with her boss, but only in general terms, and she stated that this discussion would not influence her decision in the case. The judge questioned the other 11 jurors regarding their ability to set aside all previous discussions and begin their deliberations afresh with the newly reconstituted jury.

They all claimed that they could do so. Based on these interviews, the judge decided to reimpanel Ms. Lizana as a member of the jury, and the new jury retired to deliberate. After three hours, jury returned a verdict of guilty on all counts.

II. DISCUSSION

A. Release of Juror Homoki

Huntress first argues that the district judge erred in dismissing Mr. Homoki. "[I]t is within the trial judge's sound discretion to remove a juror whenever the judge becomes convinced that the juror's abilities to perform his duties become impaired." United States v. Dominguez, 615 F.2d 1093, 1095 (5th Cir. 1980) (citations omitted); see also United States v. Helms, 897 F.2d 1293, 1298 (5th Cir.), cert. denied, ---U.S.---, 111 S. Ct. 257 (1990). We will not disturb the

judge's decision unless we find that it prejudiced the defendant or another party. United States v. Rodriguez, 573 F.2d 330, 332 (5th Cir. 1978). Prejudice occurs in these circumstances when a juror is discharged without factual support or for a legally irrelevant reason. Id. Huntress attempts to squeeze through this narrow standard of review by contending that there is a basis in the record for believing that Mr. Homoki was a holdout juror who feigned mental illness to avoid the coercive pressure of his fellow jurors. In support of this theory, Huntress points to the facts that (1) the foreman indicated to the judge after the first note that a juror had a problem with the facts or the law, not a physical or family matter; (2) the jury's second note indicated that one of the jurors did not want to participate in a decision; and (3)

Mr. Homoki had not exhibited any sign of incapacity during the voir dire or the week-long trial. Citing United States v. Wilson, 894 F.2d 1245 (11th Cir.), cert. denied sub nom. Levine v. United States, ---U.S.---, 110 S. Ct. 3284 (1990), he contends that evidence of a holdout juror is an important factor in determining whether the district judge abused his discretion.

We find that the district judge had an adequate factual and legal basis for dismissing Mr. Homoki. Wilson in no way stands for the proposition that any evidence that the juror was a holdout raises a red flag. In that case, the judge dismissed a juror who had been in poor health throughout the trial after the juror became even more ill during deliberations. In upholding the judge's decision, the court merely "note[d] that

the record does not present even the slightest basis to believe that this juror was a holdout juror or that the jury had reached any sort of impasse in its deliberations." Id. at 1250.

More importantly, the evidence to which Huntress points to support his theory that Mr. Homoki was a holdout juror is not inconsistent with Dr. Nau's diagnosis of mental incapacity. Assuming that the juror who had a problem participating in a decision was Mr. Homoki, Dr. Nau's statements to the judge support the conclusion that the problem stemmed not from Mr. Homoki's status as a holdout juror, but from a severe, pre-existing condition related to a history of drug abuse. The facts that Mr. Homoki had previously served as a juror on a jury that reached a decision, that he did not respond in the negative to the

question whether any mental or physical problem would prevent him from serving, and that he was able to sit through the trail without incident, do not detract from the judge's decision. The question was whether Mr. Homoki had <u>become</u> so impaired at a particular point in the course of his jury service that he could no longer perform the function required of him at that time. A juror's physical or mental capacity for service can change throughout the trial. Earlier, Mr. Homoki's task was simply to sit through the trial and listen to the evidence, while after the close of the evidence his task was to deliberate and reach a decision. Huntress's theory of Mr. Homoki as a hold out juror who may have feigned illness and checked himself into the hospital to avoid the pressure of his fellow jurors is pure speculation with no

support in the record. Apparently without appreciating its significance, he states that "[t]he first evidence of any physical inability to perform is Dr. Nau's phone call to the Court". This phone call, however, was critical in that it revealed to the judge that Mr. Homoki's mental state prevented him from deliberating. Huntress seeks to detract from Dr. Nau's recommendation by pointing out that he had not previously treated Mr. Homoki, but the record suggests that Dr. Nau was familiar enough with the details of Mr. Homoki's condition to evaluate his ability to continue to serve on the jury.

We decided a case very much like the present one nearly two years ago. In United States v. O'Brien, 898 F.2d 983 (5th Cir. 1990), the wife of one of the jurors telephoned the judge after deliberations began and informed him that

the juror was suffering from severe depression. The judge spoke with the juror's treating psychiatrist, who advised the judge that the juror was susceptible to bouts of depression. Although the psychiatrist had not yet decided whether to hospitalize the juror, he told the judge that the juror was in no condition to continue deliberations. We considered this information sufficient to enable the judge to release the juror. Id. at 986. Although the defendant in O'Brien did not advance a theory of the dismissed juror as a holdout, we have pointed out that the evidence in support of such a theory is also consistent with severe mental illness. Based on the judge's conversations with Mr. Homoki's doctor, we conclude, as we did in O'Brien, that the district judge did not abuse his discretion in deciding to release a juror

who became impaired as a result of mental illness during deliberations.[1]

B. Recall of Alternate Juror

Claiming denial of his right to a fair and unbiased jury, Huntress next challenges the judge's decision to substitute Ms. Lizana, the alternate juror. He argues for reversal on two grounds: the judge failed to follow the 1983 amendment to Rule 23(b), which requires an 11-juror verdict in the event a member of the original 12-member jury is unable to deliberate; and he was prejudiced by the inclusion of Ms. Lizana in deliberations.

1. Rule 23(b) Procedure

Prior to the 1983, the Federal Rules of Criminal Procedure did not address the procedures district judges should follow when a juror was released after deliberations began. Rule 23(b) required a unanimous verdict of 12 jurors, unless

the defendant agreed to accept a verdict issued by less than 12.[2] We, therefore, held that an 11-person jury could proceed to verdict, but only if the parties so stipulated and the court approved. United States v. Taylor, 507 F.2d 166, 168 (5th Cir. 1975). Rule 24(c) required, as it still does, that alternate jurors be discharged once the jury retires to deliberate. Thus, unless the parties agreed to proceed to verdict with 11 jurors, the only other option was a mistrial.

In United States v. Phillips, 664 F.2d 971 (5th Cir. 1981), cert. denied sub nom., Meinster v. United States, 457 U.S. 1136 (1982), this court permitted substitution of an alternate juror ("post-submission substitution") after a lengthy, complex trial where the trial judge took steps to ensure that the verdict would not

be tainted by the addition of an alternate juror after deliberations began. The defendants refused to stipulate to a verdict by a jury of less than 12, the costs of retrying a case that had been in trial over four months would have been significant. We pointed out that a defendant could complain about reimpaneling of an alternate juror only if it worked to his prejudice, Id. at 993,[3] and, finding both the procedural safeguards had been taken to eliminate prejudice[4] and that the record revealed little likelihood of prejudice,[5] we affirmed the verdict. Dissatisfied with this solution to the problem, the Advisory Committee on Rules shortly thereafter proposed an amendment to Rule 23(b) which would permit an 11-juror verdict even absent the parties' stipulation. The Supreme Court adopted this amendment in

1983, so that Rule 23(b) now reads:

> Jury of Less Than Twelve. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences. Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.

In the notes to the 1983 amendment, the Advisory Committee on Rules expressed a strong preference for an 11-juror verdict over the alternatives of substitution and mistrial. While recognizing that the extraordinary length of the trial made substitution preferable to mistrial in Phillips, the committee indicated that "it is far better to permit the deliberations to continue with a jury of 11 than to make a substitution...."[6] The Committee suggested that trial courts exercise their discretion to allow 11-juror verdicts absent stipulation primarily after protracted trials.

One of our decisions issued after the 1983 amendment to Rule 23(b) affirmed a jury verdict in a case where the district judge substituted an alternate after the jury had retired to deliberate. In United States v. Helms, 897 F.2d 1293 (5th Cir.)

(1990), cert. denied,---U.S.---, 111 S.Ct. 257 (1990), a pregnant juror went into labor before the third day of deliberations and the judge excused her. After failing to obtain agreement from the parties on a course of action, the judge sought and received assurances from the alternate and the remaining jurors that they could decide the case fairly. He then decided to substitute the alternate. Id. at 1298-99. We held that there was no reversible error because "[t]he record demonstrate[d] that the trial judge was extremely careful with respect to questioning the jurors and instructing them as to how they should proceed [and] was also meticulous in following the procedure set forth" in Phillips. Id. at 1299.

We did not mention in Helms the fact that Rule 23(b) directed the district

judge to allow an 11-juror verdict rather than substitute the alternate juror. A review of the briefs in that case suggests that this resulted from the defendants' desire not to proceed with 11 jurors. All but one defendant (Vandervort) expressed a preference for the procedure in Phillips, while Vandervort requested that the jury issue a sealed verdict on any decision made up to that point and then continue on with the alternate. The defendants in that case did not argue, as does Huntress, that the failure to follow Rule 23(b) amounted irreversible error. Instead, their focus was on the prejudice that inured as a result of what they considered to be the judge's improper use of the Phillips procedure. We may therefore have viewed the defendants' conduct as amounting to a waiver of any complaint about the judge's disregard for Rule 23(b).

As we point out in section II.B.2 below, Huntress's conduct also may be viewed as effecting a waiver of his right to challenged the use of the Phillips procedure rather than an 11-juror verdict, so the failure to follow Rule 23(b) here, as in Helms, in not fatal to the verdict. But we wish to emphasize that the amendment to Rule 23(b) removes from district judges any choice between proceeding with 11 jurors and using the Phillips procedures.

The district judge in this case apparently read Helms as giving him those two options. In express reliance on that decision, he asked the parties whether they preferred to continue with 11 jurors or to substitute the alternate juror using the Phillips procedures. We read Rule 23(b), in conjunction with the prohibition on recalling alternate jurors

in Rule 24(c), as requiring that district judges allow an 11-member jury to proceed to verdict or grant a mistrial. Phillips was a judicially-crafted solution to Rule 23(b)'s then-existing prohibition on 11-juror verdicts absent stipulation of the parties. We accepted the end run around Rule 24(c) both because there was no prejudice to the defendant from recalling the alternate and because the costs of a mistrial in that case would have been extremely high. The intent of the 1983 amendment to Rule 23(b), however, was to obviate the need for the Phillips procedure. Accordingly, we must conclude here that Rule 23(b) was violated when the district judge decided to substitute the alternate juror rather than proceed to verdict with an 11-member jury.

2. Effect of the Rule 23(b) Violation

Although there was a violation of Rule 23(b), we agree with the government that Huntress waived his right to complain about it when he agreed to the substitution of the alternate juror.[7] The Eleventh Circuit confronted a similar situation in United States v. Guevara, 823 F.2d 446 (11th Cir. 1987). There, the defendant's counsel objected to the district judge's proposal to follow Rule 23(b) and demanded that the alternate juror be impaneled. The judge complied, and the defendant argued on appeal that the failure to follow Rule 23(b) required reversal. The Court quite sensibly refused to allow the defenant to take advantage of his expressed desire to forego the Rule 23(b) procedure, holding that "[w]here the defendant knowingly

consents to the addition of an alternate juror, as was obviously the case here, he waives any challenge to that procedure on appeal." Id. at 448.[8] Huntress argues that he did not waive his objection to the judge's recall of the alternate juror because he consistently expressed his desire to be tried by the original jury of 12, but this argument makes little sense once we accept the judge's decision to dismiss Mr. Homoki. He also contends that he agreed to the recall only after the judge denied his motion for a mistrial, but the record reveals that he opposed an 11-juror verdict. Although Huntress did not demand the recall of the alternate juror, as did the defendant in Guevara, his desires (1) not to proceed with 11 jurors and (2) to have his fate decided by a jury of 12 provide decisive evidence that he waived his objection at the time

of the trial. His after-the-fact protestations to the contrary in his reply brief are unavailing.

Having found that the violation of Rule 23(b) is not fatal to the verdict, we must determine whether Huntress suffered any prejudice by the district judge's recall of the alternate juror. This requires an inquiry unto whether the judged afforded Huntress the protections we found critical in Phillips. As in Phillips, we need not reverse unless the substitution somehow worked to Huntress's prejudice. 664 F.2d at 994; see also Helms, 897 F.2d at 1299. Huntress argues that he was prejudiced because the alternate juror, Ms. Lizana, admitted discussing the case with her boss, and because the reconstituted jury deliberated only three hours before reaching a verdict of guilty. We disagree. Ms. Lizana had

not been sequestered during deliberations, as was the alternate in Phillips, and thus may not have been as "pure" as the alternate in that case, but she indicated that the discussion she had with her boss after she was initially released related only to the general type of case involved and not to the substance of the evidence. In response to questioning from the judge, she said that she had remained insulated from media coverage of the case and that her discussion would not influence her in any way. As for the fact that the jury deliberated only three hours, this is consistent with the inability of Mr. Homoki to participate or reach a decision. The nature of Mr. Homoki's disability suggests that the jury made little or no progress during the time he was part of the deliberations, and three hours is not an inordinately short amount of time for

deliberation in a case in which the evidence was overwhelming and the defendant's method of operation was the same in each of the five counts. Finally, the judge received assurances from each juror individually about his or her ability to disregard deliberations that took place with Mr. Homoki present, and instructed the jury to begin anew with Ms. Lizana. These procedures were substantially the same as were followed in Phillips and Helms, and afforded Huntress adequate protection from a tainted verdict.

3. Procedures for the Future

For the future, we wish to emphasize that district judges in this circuit should follow Rule 23(b) rather than substitute alternate jurors when a juror is excused after deliberations begin. The Second Circuit has expressed doubt about

whether post-submission substitution is still permissible after the amendment to Rule 23(b), United States v. Stratton, 779 F.2d 820, 831-32 (2d Cir. 1985), cert. denied, 476 U.S. 1162 (1986), and the Third Circuit has expressly held that trial judges should allow 11-juror verdicts under Rule 23(b) rather than substitute alternate jurors. United States v. Gambino, 788 F.2d 938, 948-49 (3rd. Cir.), cert. denied, 479 U.S. 825 (1986).[9] We think it goes without saying that district judges are obligated to follow the Federal Rules of Criminal Procedure rather than a judicially-crafted solution to a problem which was not addressed by the Rules at the time of the decision. Although Rule 23(b) does not explicitly bar use of the substitution option, the text of the amended rule, together with Rule 24(c)'s direction to

discharge alternate jurors before the jury retires, signals to us that substitution is quite inconsistent with the intent of the drafters of the Rules. The virtues of the 11-juror verdict allowed by Rule 23(b) are that it eliminates the risk of prejudice that arises whenever an alternate juror is recalled and does not require the agreement of the parties. District judges in this circuit therefore should no longer resort to the procedures used in Phillips and Helms.

C. Sufficiency of the Evidence on Count Three

Huntress next argues that there was no evidence to support a conviction on count three of the indictment. Count three alleged that Huntress violated 18 U.S.C. § 1014 by knowingly making a false representation to a federally insured bank for the purpose of influencing an

extension of credit in connection with a $35,000 loan made by MBank Alamo, N.A. The elements of a § 1014 violation are:

> (1) the defendant made a false statement to an insured financial institution;
>
> (2) the defendant made the false statement knowingly; and
>
> (3) the statement was made for the purpose of influencing the financial institution's action; and
>
> (4) the statement was false as to a material fact.

United States v. Thompson, 811 F.2d 841, 844 (5th Cir. 1987). The "essence" of a § 1014 offense is the making of a false statement with the intent to influence the lender; it does not depend on whether the defendant accomplished that purpose. United States v. Shaid, 730 F.2d 225, 232

(5th Cir.), cert. denied, 469 U.S. 844 (1984). We review all challenges to the sufficiency of the evidence under a common standard: we must determine whether a rational trier of fact could have found that the evidence established guilt beyond a reasonable doubt. United States v. Gardea Carrasco, 830 F.2d 41, 43 (5th Cir. 1987); United States v. Bell, 678 F.2d 547, 549 (5th Cir. Unit B 1982) (en banc), aff'd on other grounds, 462 U.S. 356 (1983). We consider all the evidence, direct and circumstantial, in a light most favorable to the government, and we "accept all reasonable inferences which tend to support the jury's verdict." Id. at 43-44. Factfinders have considerable leeway in drawing inferences. They may "use their common sense" and "evaluate the facts in light of their knowledge of the natural tendencies and inclinations of

human beings.'" United States v. Ayala, 887 F.2d 62, 67 (5th Cir. 1989) (citations omitted).

Applying this standard of review to the evidence concerning Huntress's making of a false statement with intent to influence the lender, we conclude that there is sufficient evidence to support the verdict. Count three involved a request made by Huntress over the telephone in June 1987 for a loan for the purpose of purchasing stock options. This was the second of three applications to MBank Alamo for unsecured loans above a limit that had been set earlier.[10] Reagan Houston, then Senior Vice President of MBank Alamo, testified that he had relied on Huntress's September 1986 financial statement in making the first of the three loans. He testified that when he received the request for the $35,000 loan in June

1987, he consulted Huntress's new financial statement dated April 10, 1987 and, while speaking over the telephone to Huntress, referred to the portion of the April 1987 statement in which Huntress claimed to have large holdings of common stock. Houston asked Huntress whether he still owned the stock and whether it was still unpledged to other debts, and Huntress answered both questions in the affirmative. On the basis of these affirmations, the bank approved the loan. The evidence showed that Huntress's representations about unencumbered stock ownership were false. Houston's testimony clearly showed that Huntress used these representations to obtain the $35,000 loan from MBank Alamo. From this evidence, the jury could easily have concluded that Huntress knowingly made a false statement to the bank with the intent to influence

it in connection with the June 1987 loan.

D. Jury Instruction on Intent

Huntress contends that the trial judge erred in refusing to give his requested jury instruction on the element of intent under § 1014. Huntress wanted to instruct the jury to find that he "knowingly did an act which the law forbids, purposely intending to violate the law." He also contends that the judge erred in refusing to instruct the jury that the term "influence" means "to affect or alter the conduct, thought or character of by indirect or tangible means: sway." He argues that "influence" under § 1014 modifies the concept of intent, so that a specific definition of influence is necessary to enable the jury to understand the intent requirement for this crime. We review the refusal to give the requested instructions under an abuse of discretion

standard. United States v. Rochester, 898 F.2d 971, 978 (5th Cir. 1990). We may not disturb a conviction on the ground that a requested jury instruction was not given unless the instruction was legally correct, represented a viable defense theory which would lead to acquittal, and was not effectively presented elsewhere in the charge. United States v. Mollier, 853 F.2d 1169, 1174 (5th Cir. 1988), United States v. Rubio, 834 F.2d 442, 447 (5th Cir. 1987).

The district judge gave the Fifth Circuit pattern jury instructions for violations of 18 U.S.C. § 1014, charging the jury that the government had to prove:

> First: That the bank listed in the particular count was federally insured; Second: That the defendant made a false statement to that bank knowing it was false;

> and Third: That the defendant did so for the purpose of influencing that bank to give the defendant a loan or loan extension.

This charge required the government to prove the elements of § 1014. Huntress has cited no authority that would cast doubt on these Pattern Jury Instructions or that holds that the defendant must know his conduct is unlawful. Certainly, the government must prove that the defendant knew that the statements he was making to the financial institution were false; but this is quite different than requiring the government to prove that the defendant knew that making false statements to a financial institution is a violation of the law. Huntress's requested instruction on specific intent implies the latter and is simply a misstatement of the law. Under Mollier, refusal to give this

instruction cannot be reversible error. Moreover, the judge refused to give the requested definition of the word "influence" because, he stated, that word is used in this everyday meaning in the statute. We agree with the judge that no elaboration was needed.

III. CONCLUSION

Although the district judge did not abuse his discretion in deciding to discharge Mr. Homoki from the jury, he had the discretion to permit the 11-person jury to deliberate and reach a verdict regardless of the defendant's refusal to consent. We emphasize again that district judges should follow Rule 23(b)--that is, they should decide whether to proceed with an 11-person jury or retry the defendant--rather than substitute an alternate juror under the procedure approved of in United States v. Phillips. Although the judge

here did substitute, we conclude that the defendant waived any objection to the violation of Rule 23(b) by refusing to agree to an 11-juror verdict and by agreeing to the substitution of the alternate juror. We further conclude that the defendant was not prejudiced by the reimpaneling of juror Lizana. Finally, we conclude that the evidence was sufficient to support the conviction on count three and that the district judge did not err in refusing the defendant's requested jury instructions. The conviction is AFFIRMED.

1. Given the evidence of Mr. Homoki's disability provided by Mr. Homoki's doctor, the district judge was not required, as Huntress argues, to hold an evidentiary hearing in which both parties could explore the existence of just cause for dismissal. Although the judge stated that he was not certain whether a hearing had been held prior to dismissal in United States v. Helms, 897 F. 2d 1293 (5th. Cir.), cert. denied, --- U.S.---, 111 S. Ct. 257 (1990), he clearly had enough information from the phone call to make a decision, and there was no evidence suggesting any other reason for Mr. Homoki's inability to continue to serve. Under these circumstances, a hearing would not have served any useful purpose.

Or resolution of this issue also disposes of Huntress's contention that he was denied the right to a fair trial and to effective assistance of counsel as a result of Mr. Homoki's answers during voir dire. Huntress contends that, had he known of Mr. Homoki's true condition, he could have exercise his peremptory challenges in a more informed manner. The information provided by Mr. Homoki's doctor to the court, however, indicates that Mr. Homoki's paranoia prevented him from honestly answering the questions on voir dire. Given Mr. Homoki's condition, it does not appear that he intentionally misled the court; he likely had no greater ability to predict his impairment than did the jurors in O'Brien and Helms.

2. There is no constitutional bar to a jury verdict of less than 12. William v. Florida, 399 U.S. 78 (1970).

3. We had earlier held that a violation of Rule 24(c) would not require reversal unless there was a reasonable possibility that the violation had an effect on the verdict. United States v. Allison, 481 F.2d 468, 472 (5th Cir. 1973), cert. denied, 416 U.S. 982 (1974). In Allison, the rule was violated when the trial judge permitted the alternate to sit in on the jury's deliberations.

4. The judge received assurances from the alternate that he had neither been exposed to publicity about the trial nor discussed it, confiscated materials the other jurors had used during deliberations, received assurances from the other jurors individually that they could put aside their earlier deliberations, and instructed the jurors to begin anew with the alternate juror. Phillips, 664 F.2d at 990-91.

5. We noted that the jury deliberated for one week after the alternate was substituted. Phillips, 664 F.2d at 996. This was important evidence that deliberations with the alternate were full and fair. We contrasted this with United States v. Lamb, 529 F.2d 1153 (9th Cir. 1975) (en banc), in which one factor leading the court to reject post-submission substitution was the fact that the reconstituted jury deliberated only 29 minutes. Phillips, 664 F.2d at 995-96.

6. The Committee considered and rejected an amendment to Rule 24 which would have allowed post-submission substitution of an alternate juror if defendants were afforded the protections

of Phillips. See 91 F.R.D. 289, 341-45 (1981).

7. We might be inclined to disregard the waiver if the Rule 23(b) violation was so prejudicial that we could not countenance a verdict under any circumstances. See United States v. Josefik, 753 F.2d 585, 588 (7th. Cir.), cert. denied, 471 U.S. 1055 (1985). However, the Rule 23(b) violation, strictly speaking, was only in the district judge's failure to choose between the alternatives of an 11-juror verdict and a mistrial. The actual substitution of the alternate juror is a separate violation of Rule 24(c), which requires the judge to discharge alternates when the jury retires to deliberate. We have repeatedly held that violations of Rule 24(c) are not per se prejudicial, e.g., Allison, 481 F.2d at 472, and there is no reason why violations of Rule 23(b) would be any more inherently prejudicial. Thus, we do not see any reason not to accept Huntress's waiver of the Rule 23(b) violation.

8. While we agree with Guevara that a defendant can waive an objection to the district judge's recall of an alternate juror, we disagree with the Eleventh Circuit's implication that post-submission substitution is an alternative to Rule 23(b) that can be employed whenever a defendant expresses a desire to substitute or to have his fate decided by a jury of 12. As noted above, our acceptance of the Phillips procedure in Helms may have stemmed from the defendant's expressed desire to substitute. But without any analysis in Helms of whether Rule 23(b)

leaves open the option to substitute alternate jurors, we must conclude that the case does not stand for the proposition that judges may simply choose between Rule 23(b) and Phillips.

9. In Gambino, the court rejected the defendants' argument that the district judge should have disregarded Rule 23(b) and substituted an alternate.

10. The first of these applications, in April 1987, formed the basis for count two.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-5626

U.S.Court of Appeals
FILED
April 28, 1992
Gilbert E. Ganucheau,
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LOGAN P. HUNTRESS,

Defendant-Appellant

Appeal from the United States District Court for the Western District of Texas

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ON PETITION FOR RHEARING

(April 28, 1992)

Before THORNBERRY, KING and DEMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERED tht the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Carolyn Dinlen King
UNITED STATES CIRCUIT JUDGE

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

(2)

No. 92-109

Supreme Court, U.S.
FILED
OCT 5 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

LOGAN P. HUNTRESS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether it was reversible error for the district court to replace a juror who was excused for cause after jury deliberations began.

2. Whether the district court erred in declining to conduct an evidentiary hearing on the need to discharge a juror for cause.

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In the Supreme Court of the United States

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No. 92-109

LOGAN P. HUNTRESS, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A43) is reported at 956 F.2d 1309.

JURISDICTION

The judgment of the court of appeals was entered on March 18, 1992. A petition for rehearing was denied on April 28, 1992. Pet. App. A44-A45. The petition for a writ of certiorari was filed on May 29, 1992. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted on five counts of making a false statement to a fed-

erally insured banking institution for the purpose of influencing it in extending a loan, in violation of 18 U.S.C. 1014. He was sentenced to a term of four years' imprisonment, to be followed by five years' probation, and he was ordered to make restitution in the amount of $730,000. The court of appeals affirmed. Pet. App. A1-A43.

1. The evidence at trial showed that petitioner submitted false financial statements when he applied for loans from several banks in San Antonio, Texas. He stated in financial statements submitted to the banks and in discussions with bank officers that he had a substantial unencumbered stock portfolio. In fact, however, petitioner did not own the stocks listed in his financial statements. Officers from the banks relied on petitioner's written and oral statements regarding his financial position in deciding to extend him credit. Pet. App. A2-A3.

2. On the morning of the second day of jury deliberations, the court received a note from the jury foreman stating that one of the jurors wanted a conference with the judge. In response to questioning, the foreman told the judge that the juror had a problem with the facts or the law of the case. The judge told the foreman to submit the juror's question in writing. An hour later, the jury sent a return note to the judge that said, "A juror doesn't want to participate in arriving [at] a verdict. What do we do?" The judge sent a note back stating, "All jurors will continue to deliberate until you have reached a verdict." The jury did not reach a verdict that day. Pet. App. A3-A4.

The next morning, Dr. Nau, a doctor who was treating juror Homoki, contacted the court. Dr. Nau reported that Homoki had checked himself into a hospital the previous night, threatening to ingest poison if the hospital refused to admit him. After some discussion with the

parties, the judge called Dr. Nau to find out the details of the juror's condition. Dr. Nau told the judge over the telephone that the juror was distraught and suicidal, and that he was suffering from paranoia stemming from a history of drug abuse. Dr. Nau expressed the view that Homoki's condition was brought on by stress related to his jury service, and that Homoki could not make a decision in the case in his present condition. He recommended that Homoki not be required to return to jury duty when he was released from the hospital. Defense counsel requested an evidentiary hearing to examine both Homoki and the doctor, but the court determined that its conversation with Dr. Nau provided a sufficient basis for excusing Homoki from jury service. Pet. App. A4-A5.

The district court then presented the parties with three options: allowing the remaining 11 jurors to proceed to a verdict; recalling the alternate juror, Ms. Lizana, who had been discharged when the jury retired to deliberate; or declaring a mistrial. Petitioner objected to the release of Homoki, refused to stipulate to an 11-person jury, and objected to recall of the alternate juror. The government expressed a preference for an 11-person jury, and pointed out that, under Fed. R. Crim. P. 23(b), the court could proceed with 11 jurors without obtaining petitioner's consent. Petitioner then moved for a mistrial based on Homoki's failure to give truthful answers to the voir dire questions concerning his ability to serve on the jury. The court, citing a statement by Dr. Nau that Homoki would have been unable to recognize his psychological condition during voir dire, decided that Homoki did not deliberately lie, and it denied the motion for a mistrial. Pet. App. A5-A7.

Petitioner then requested that alternate juror Lizana be recalled and examined to determine whether she could properly be reimpaneled. The district court recalled

Lizana and questioned her. Lizana stated that she had discussed the case with her boss, but only in general terms, and she stated that the discussion would not influence her decision in the case. The court questioned the 11 remaining jurors regarding their ability to set aside all previous discussions and begin their deliberations afresh with Lizana as a juror. They all stated that they could do so. Based on those interviews, the court decided to reimpanel Lizana, and the reconstituted jury retired to deliberate. After three hours, the jury returned a verdict of guilty on all counts. Pet. App. A7-A8.

3. On appeal, the court of appeals held, first, that "the district judge had an adequate factual and legal basis for dismissing Mr. Homoki." Pet. App. A10. The court rejected petitioner's theory that Homoki was a holdout juror who feigned illness to avoid the pressure of his fellow jurors as "pure speculation with no support in the record." *Id.* at A12-A13. The court stated that, "[a]ssuming that the juror who had a problem participating in a decision was Mr. Homoki, Dr. Nau's statements to the judge support the conclusion that the problem stemmed not from Mr. Homoki's status as a holdout juror, but from a severe, pre-existing condition related to a history of drug abuse." *Id.* at A11.

The court of appeals then concluded, Pet. App. A23, that the district court's reinstatement of the alternate juror violated Fed. R. Crim. P. 23(b), which provides that the district court has discretion to proceed with an 11-person jury when it becomes necessary to discharge a juror for cause after the jury has retired to deliberate.[1]

---

[1] Rule 23(b) states:

> Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a

The court explained that "[a]lthough Rule 23(b) does not explicitly bar use of the substitution option, the text of the * * * rule, together with [Fed. R. Crim. P.] 24(c)'s direction to discharge alternate jurors before the jury retires, signals to us that substitution is quite inconsistent with the intent of the drafters of the Rules." Pet. App. A29-A30.

Although the court of appeals found that the reinstatement of the alternate juror violated Rule 23(b), it concluded that reversal was not required because petitioner "waived his right to complain about it when he agreed to the substitution of the alternate juror." Pet. App. A24. The court explained that, while petitioner "did not demand the recall of the alternate juror, * * * his desires (1) not to proceed with 11 jurors and (2) to have his fate decided by a jury of 12 provide decisive evidence that he waived his objection at the time of the trial." *Id.* at A25-A26. The court then determined that petitioner was not prejudiced by the substitution. Pet. App. A26-A28.

ARGUMENT

Petitioner contends that the district court erred in replacing Homoki with an alternate juror after the jury had begun its deliberations; he also contends that the court should have conducted an evidentiary hearing before discharging Homoki. Those claims do not warrant this Court's review.

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valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences. Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.

1. The court of appeals agreed with petitioner in concluding that the district court violated Rule 23(b) when it reinstated the alternate juror. The court of appeals made clear (Pet. App. A10) that district courts having to excuse a juror after deliberations have commenced should proceed with an 11-person jury instead of replacing the excused juror with an alternate.

Despite the district court's error, the court of appeals was correct to conclude that reversal was not warranted. As the court of appeals held, petitioner effectively consented to the substitution of juror Lizana when he opposed permitting an 11-person jury to reach a verdict and insisted on a jury of 12.[2] Petitioner does not take issue with the court of appeals' finding of consent. Having made the tactical decision at trial to object to an 11-juror verdict—which under Rule 23(b) was the only available alternative to a mistrial—petitioner is in no position to invoke the Rule 23(b) violation as a ground for reversal. See *United States* v. *Guevara*, 823 F.2d 446, 448 (11th Cir. 1987) (finding waiver of claim of improper substitution of a juror following commencement of deliberations); *United States* v. *Josefik*, 753 F.2d 585, 588 (7th Cir.) (same), cert. denied, 471 U.S. 1055 (1985).

Indeed, after the court excused Homoki, defense counsel requested that alternate juror Lizana be recalled and qualified to serve on the jury if possible. VIII Tr. 27. Moreover, defense counsel insisted that certain questions be asked of Lizana, and the court complied with those requests; after the questioning, defense counsel did not object to the court's decision to seat Lizana. *Id.*

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[2] Although petitioner preferred to retain the original jury of 12 members, that option was foreclosed by the district court's decision that Homoki should be discharged. At that point, petitioner's opposition to an 11-person jury "provide[d] decisive evidence that he waived his objection [to the recall of the alternate]." Pet. App. A25.

at 31-33, 35-36. In these circumstances, it would be inappropriate to permit petitioner to claim on appeal that the court erred by following the very procedure he requested, especially since petitioner has failed to allege any prejudice flowing from the substitution of the alternate juror in this case. The courts of appeals have consistently held that, except perhaps in the most exceptional circumstances, a defendant may not obtain reversal of his conviction based on a trial error that he invited. *E.g.*, *United States* v. *Nagi*, 947 F.2d 211, 214 (6th Cir. 1991), cert. denied, 112 S. Ct. 2309 (1992); *United States* v. *Lopez-Escobar*, 920 F.2d 1241, 1246 (5th Cir. 1991); *United States* v. *Eagle Thunder*, 893 F.2d 950, 953 (8th Cir. 1990).

The cases on which petitioner relies do not establish a conflict in the circuits. In *United States* v. *Gambino*, 788 F.2d 938 (3d Cir.), cert. denied, 479 U.S. 825 (1986), the defendants contended that the district court erred in permitting an 11-person jury to return a verdict when a juror was excused after deliberations began, instead of replacing the excused juror with an alternate. The court of appeals rejected that contention, finding that the district court acted properly in refusing to require substitution of an alternate juror. 788 F.2d at 948-949.[3] *Gambino* is consistent with the decision in this case, which recognized that Rule 23(b) requires that the district court either declare a mistrial or proceed with a jury of 11 when a juror is excused after deliberations begin.

Nor does *United States* v. *Lamb*, 529 F.2d 1153 (9th Cir. 1975) (en banc), the other case on which petitioner

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[3] In discussing the point, the court stated, 788 F.2d at 948-949, that it would have been error to follow the defendants' preferred course. The court did not suggest, however, that the error would have required reversal. In fact, the court noted that the courts of appeals had "invariably" required a showing of prejudice in similar circumstances before reversing. 788 F.2d at 948.

relies, conflict with the decision in this case. The court of appeals in *Lamb* held that it was reversible error to replace a regular juror with an alternate after deliberations had commenced. In *Lamb*, however, the defendant objected to the substitution of the alternate juror. Accordingly, the court of appeals was not faced with a situation, like that here, in which the defendant had waived his right to have jury deliberations conducted according to the procedures set forth in Rule 23.[4] Indeed, *Lamb* distinguished an earlier Ninth Circuit decision, *Leser* v. *United States*, 358 F.2d 313, cert. dismissed, 385 U.S. 802 (1966), on the ground that the defendant in *Leser* had failed to preserve his objection to the juror substitution.

The Court currently has a related issue pending before it in *United States* v. *Olano*, cert. granted, 112 S. Ct. 1935 (1992). The issue in *Olano* is whether it is plain error for a district court to permit the alternate jurors to observe the jury deliberations. In *Olano*, the Ninth Circuit held that allowing the alternates to observe the jury's deliberations constituted reversible error despite the defendants' consent, because that practice results in inherent prejudice in the form of an invasion of juror privacy. *United States* v. *Olano*, 934 F.2d 1425, 1438 (1991).

There is no need to hold this case pending the decision in *Olano*. The court of appeals in *Olano* thought that the prejudice resulting from the presence of strangers in the jury room justified a finding of plain error. In this case, by contrast, no "non-juror" was present during deliberations, and no questions of jury privacy and possible juror

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[4] Although the *Lamb* court suggested, see 529 F.2d at 1156 n.3, that the violation in that case was automatic reversible error, later Ninth Circuit panels have rejected that position. See *United States* v. *Rubio*, 727 F.2d 786, 799 n.7 (1983) (per curiam); *United States* v. *Crisco*, 725 F.2d 1228, 1233, cert. denied, 466 U.S. 977 (1984); *United States* v. *Lopez*, 581 F.2d 1338, 1342 (1978).

exposure to outside influences are raised. Indeed, the court of appeals in *Olano* distinguished cases such as this one, in which an alternate juror is substituted for a regular juror, from the situation there, in which non-members of the jury were present during deliberations. See 934 F.2d at 1437 n.21.

2. There is also no merit to petitioner's contention that the district court was required to hold an evidentiary hearing before deciding to discharge Homoki. The decision whether to hold a hearing on the existence of "just cause" to discharge a juror is within the discretion of the trial court. See *United States* v. *Fajardo*, 787 F.2d 1523, 1525 (11th Cir. 1986); *United States* v. *Rodriguez*, 573 F.2d 330, 332 (5th Cir. 1978). That discretion is not abused where the juror's disability is clear. *Fajardo*, 787 F.2d at 1525. Here, the court of appeals correctly concluded (Pet. App. A40 n.1) that, "[g]iven the evidence of Mr. Homoki's disability provided by Mr. Homoki's doctor, the district judge was not required, as [petitioner] argues, to hold an evidentiary hearing." Petitioner's assertion (Pet. 23) that the court "blind[ly] assum[ed]" that Dr. Nau was a real doctor is incorrect. To the contrary, the district court questioned Dr. Nau at length over the telephone, and was well situated to make an informed judgment about Dr. Nau's professional status. See *United States* v. *O'Brien*, 898 F.2d 983 (5th Cir. 1990) (upholding discharge of juror based on trial judge's telephone conversations with the juror's wife and doctor concerning juror's mental condition).

Moreover, petitioner had an opportunity to question Dr. Nau at the time the court was considering discharging Homoki, but failed to bring any facts to the court's attention that called into question either Dr. Nau's veracity or his medical judgment. Before deciding to discharge Homoki, the court informed the parties that Dr. Nau "is available if any one of you want to question him."

VIII Tr. 21. Defense counsel did not take advantage of that opportunity, but let the matter drop without contacting Dr. Nau.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] Although petitioner's counsel initially requested an evidentiary hearing on the matter (see VIII Tr. 6-7), counsel did not renew that objection after the court described its conversation with Dr. Nau in detail later in the day. Moreover, although petitioner suggests that there was no basis even for believing that Dr. Nau existed, it is clear from the trial transcript that the district court was familiar with him and had no doubt as to his veracity. See *id.* at 20-21 ("I don't know if you know [Dr. Nau]—he is a psychiatrist here in town and obviously psychiatrists are always called to testify, and he has testified before."). Petitioner's suggestion (Pet. 18-24) that some fraud was perpetrated on the court is inconsistent with his counsel's failure to suggest to the district court that Dr. Nau might not exist or might not be qualified to render an opinion as to Homoki's capacity. Although petitioner claims that "the 'doctor's' opinion * * * was not subjected to any standard of credibility [and] was simply accepted at face value by the trial court," Pet. 23, his counsel failed to seek to question Dr. Nau or otherwise provide any reason for the district court to doubt the accuracy of Dr. Nau's assessment of Homoki's condition.